# SHORELINES HEARINGS BOARD 1 STATE OF WASHINGTON 2 THE LOG FOUNDATION, EASTLAKE COMMUNITY COUNCIL, and FLOATING 3 HOMES ASSOCIATION; and 1926 SHB No. 15-003c FAIRVIEW AVENUE E HOMEOWNERS 4 ASSOCIATION. 5 Petitioners ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND MOTION 6 FOR DISMISSAL v. 7 CITY OF SEATTLE DEPARTMENT OF PLANNING AND DEVELOPMENT, and 8 LAKE UNION INVESTMENTS, LLC 9 Respondents. 10 11 **INTRODUCTION** 12 On February 18, 2015, Petitioners The Log Foundation, Eastlake Community Council 13 and Floating Homes Association filed a petition with the Shorelines Hearings Board ("Board"). The February 18<sup>th</sup> petition was assigned matter number SHB No. 15-003. On February 19, 2015, 14 Petitioner 1926 Fairview Avenue E Homeowners Association filed a petition with the Board. 15 The February 19<sup>th</sup> petition was assigned matter number SHB No. 15-004. On February 20, 2015, 16 Petitioners Lynn Hoskins, Daniel Reddy, Stefanie Graen, Jeff Granger, and Chet Leroy filed a 17 petition with the Board. The February 20<sup>th</sup> petition was assigned matter number SHB No. 15-18 005. The petitions challenge a decision by the City of Seattle Department of Planning and 19 Development (City) dated January 29, 2015. The City's January 29<sup>th</sup> decision approves a 20 21 Shoreline Substantial Development Application submitted by Respondent Lake Union

1	Investments, LLC. The Shoreline Substantial Development Permit (SSDP) will allow a 30-foot		
2	wide by 140-foot long boat ramp to be constructed for access to Lake Union by amphibious tour		
3	vessels and the construction of a 3-foot by 32-foot dock as moorage for an emergency response		
4	vessel.		
5	On March 9, 2015, a telephonic prehearing conference was held in this matter by the		
6	presiding officer. <sup>1</sup> A Prehearing Order, dated March 12, 2015, was issued, and the following		
7	legal issues were set for hearing:		
8	1. Whether the SSDP is inconsistent with the policies in RCW 90.58.020 concerning public access and recreation?		
9	2. Whether the SSDP is inconsistent with the goals and policies of Chapter 23.60 of the Seattle Municipal Code concerning public health, traffic, public recreational use of the shoreline and impacts to surrounding land and water uses?		
11 12	<ul><li>3. Whether the City erred in approving the proposed boat ramp as an allowed use within the Urban Environment?</li></ul>		
13	4. Whether the SSDP is inconsistent with the goals and policies of Chapter 25.08 of the Seattle Municipal Code and whether the Board has jurisdiction over Chapter 25.08?		
<ul><li>14</li><li>15</li></ul>	5. Whether the SSDP is inconsistent with the City's Shoreline Goals and Policies concerning public recreational use of the shoreline?		
16	6. Whether the City's issuance of a State Environmental Policy Act (SEPA) Determination of Nonsignificance (DNS) was clearly erroneous with regard to the		
<ul><li>17</li><li>18</li></ul>	Project's potential impacts to noise, public safety, air quality and public health, water		
19 20	The Petitioners for SHB 15-005, Hoskins, Reddy, Graen, Granger, and LeRoy, failed to appear at the prehearing onference. Matter SHB 15-005 was initially consolidated into SHB 15-003c, however, following the issuance of the Prehearing Order, an Order to Show Cause was issued to the Petitioners for SHB 15-005. The Board did not beceive any filings from Petitioners Hoskins, Reddy, Graen, Granger, or LeRoy in response to the Order to Show		

15-005 due to the petitioners' failure to participate.

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Cause or in response to the cross-motions for summary judgment that are addressed in this Order. By separate Order dated May 5, 2015, the Board dismissed Petitioners Hoskins, Reddy, Graen, Granger, and LeRoy and SHB

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quality, fish and wildlife, and traffic and its imposition of conditions relating to these elements of the environment?

Petitioners The Log Foundation, Eastlake Community Council and Floating Homes
Association (hereinafter "The Log Foundation") filed a motion for partial summary judgment on
Issue 3. Respondents, Lake Union Investments, LLC and the City filed a joint motion for partial summary judgment on Issue 3 and a motion to dismiss Issue 4 for lack of jurisdiction.<sup>2</sup>

For the cross-motions for summary judgment, David Mann appeared on behalf of the Petitioners The Log Foundation. Patrick Williams appeared on behalf of the Petitioners 1926
Fairview Avenue East Homeowners Association. Thomas Backer appeared on behalf of Respondent City of Seattle. Courtney Kaylor, John McCullough and Katie Kendall appeared on behalf of the Respondent Lake Union Investments, LLC. The Board considering this matter was comprised of Board Member Tom Morrill, presiding, Board Member Dave Somers, and Board Member Jennifer Gregerson.<sup>3</sup> The Board reviewed the following pleadings submitted by the parties:

- 1. Log Foundation's Motion for Summary Judgment.
- 2. Declaration of David S. Mann, with Exhibits 1-7.
- 3. Lake Union Investments, LLC and City of Seattle's Joint Response to Log Foundation's Motion for Summary Judgment.
- 4. Declaration of Courtney A. Kaylor, with Exhibits 1-2.
- 5. Log Foundation's Reply in Support of Summary Judgment.

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<sup>2021</sup> 

<sup>&</sup>lt;sup>2</sup> Although the Respondents refer to the motion concerning Issue 4 as a motion to dismiss, the motions were supported by declaration and exhibits. Because matters outside the pleading were presented and considered by the Board, the analysis for this Order will proceed as for a motion for partial summary judgment. *See* CR 12(b) and (c). <sup>3</sup> Pursuant to the authority of RCW 90.58.185, this case was heard by a three-member panel of the Board.

- 6. Lake Union Investments, LLC and City of Seattle's Joint Motions for Partial Summary Judgment and Partial Dismissal.
- 7. Petitioners Response to the Motion for Partial Summary Judgment.
- 8. Log Foundation's Response to Respondents' Joint Motion for Summary Judgment and Partial Dismissal.
- 9. Lake Union Investments, LLC and City of Seattle's Joint Reply on its Motion for Partial Summary Judgment and Partial Dismissal.

Based on the record and evidence before the Board on the motions, the Board makes the following decision.

# **BACKGROUND**

Lake Union Investments, LLC operates an amphibious tour boat business known as Ride the Ducks. Mann Decl., Ex. 1 at 2. The amphibious vehicles are called "Ducks" and are used to provide tours of the Seattle area including Lake Union. *Id.* at 3. The SSDP will allow Lake Union Investments to construct a boat launching ramp to be used by the Ducks that will be approximately 30 feet wide and 140 feet long (Project). *Id.* at 1. The Project will be constructed on a property located at 1949 Fairview Avenue East on the eastern shore of Lake Union in the City of Seattle ("Project Site"). *Id.* at 2. The Project includes construction of a 3-foot by 32-foot emergency dock for moorage for an emergency response vessel and the planting of native vegetation, including evergreen trees and low shrubs. *Id.* at 1-3.

The Project Site is private property that is bordered by private property to the south and by Terry Pettus Park, a City park, to the north. *Id.* at 2. The Project Site is in the Urban Maritime (UM) shoreline environment and is zoned Industrial General 1, Unlimited 45. *Id.* 

The Ducks currently access Lake Union at the Sunnyside Public Boat Launch on the northern shore of Lake Union. *Id.* at 3. The Project Site will be the replacement location for the Ducks ingress and egress of Lake Union. *Id.* The Project Site will not be open for general access by the public. It will be gated and locked and only accessible for Ride the Ducks operations, and those operations will not include any loading or unloading of passengers at the Project Site. *Id.* at 4.

The City determined in its decision on the SSDP that the Project is a shoreline recreation use. *Id.* at 7. A shoreline recreation use is a permitted use in the UM Environment. SMC 23.60.720(I). The City also decided in its SEPA determination that the potential noise impacts of the Project could be mitigated through existing noise ordinance controls and additional conditions imposed by the City. Mann Decl., Ex. 1 at 23-24.

#### **ANALYSIS**

#### SUMMARY JUDGMENT STANDARD

Summary judgment is a procedure available to avoid unnecessary trials where there is no genuine issue of material fact. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton* 

Franklin Title Co., Inc., 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a 1 2 summary judgment proceeding is one affecting the outcome under the governing law. Eriks v. 3 Denver, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating that material facts are in 4 5 dispute. Atherton Condo Ass'n v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990), reconsideration denied (1991). In a summary judgment proceeding, all facts and reasonable 6 inferences must be construed in favor of the non-moving party. Jones v. Allstate Ins. Co., 146 7 8 Wn.2d 291, 300, 45 P.3d 1068 (2002). 9 Issue 3: Is the Boat Launching Ramp an Allowed Use in the UM Environment? The Log Foundation has moved for partial summary judgment on Issue 3 which 10 11 12

questions whether the City erred in approving the proposed boat launching ramp as an allowed use within the UM Environment. Petitioner 1926 Fairview Avenue E Homeowners Association supports the Log Foundations' motion. The Respondents oppose the motion and ask for summary judgment in their favor on Issue 3.

The Log Foundation begins by asserting that the Project is not a use that is specifically identified in the SMP, and thus it is prohibited under SMC 23.60.014.A which provides that: "To be permitted in the Shoreline District, a use must be permitted in both the shoreline environment and the underlying zone in which it is located." According to the Log Foundation, the Project is a private commercial boat ramp and such a use is not listed as an allowed commercial use within the UM Environment.

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As noted above, however, the City did not approve the Project as an allowed commercial use, but rather approved the SSDP on the basis that the Project is a shoreline recreation use. See, Mann Decl., Ex. 1 at 7. A shoreline recreation use is a specifically permitted use in the UM Environment. SMC 23.60.720(I). The question then is whether the Project falls within the definition of shoreline recreation.

The definition for shoreline recreation under the SMP is set forth in SMC 23.60.936-"S." which states:

> "Shoreline recreation" means an open-space use which consists of a park or parklike area which provides physical or visual access to the water. The following and similar uses are included: fishing piers, swimming areas, underwater diving areas or reefs, boat launching ramps, bicycle and pedestrian paths, viewpoints, concessions without permanent structures, floats and bathhouses.

The Log Foundation argues that the proposed use for the Project, as a private commercial boat ramp, does not meet the definition of shoreline recreation set forth in SMC 23.50.936-"S.". The Log Foundation reads the definition of shoreline recreation to apply only to boat launching ramps that are open to the general public. The Log Foundation argues that the first sentence in the definition of shoreline recreation modifies the entire definition, and thus all shoreline recreational uses must be in a "park or parklike area" that is open to the public.

Lake Union Investments and the City argue that the definition of shoreline recreation clearly states that a boat launching ramp is shoreline recreation. The Respondents argue that the definition is clear on its face as it includes a list of specific uses that "are included" in the coverage of shoreline recreation, one of which is boat launching ramps. Moreover, the

Respondents argue that the definition does not state that a shoreline recreational use must be public. Rather, the definition refers to open-space uses that take place in a "park or parklike setting" and provide physical or visual access to the water. According to the Respondents the Project meets that definition.

In determining the intent of the City Code, the Board looks at the language of the specific regulation and related regulations. *See Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). The definition of shoreline recreation is not specifically limited to public parks. The definition generally covers "open-space uses" which consist of a park or parklike area which provide physical or visual access to the water. SMC 23.60.936-"S." The definition goes on to state that certain specific uses, including boat launching ramps, are included in the type of uses that would be considered shoreline recreation. *Id.* The language in the definition does not specifically require a boat ramp to be a public boat ramp. Moreover, the inclusion of boat launching ramps in the specific list indicates that such facilities are assumed to be an "open-space use" and are assumed to provide access to the water in a park or parklike area. The language in the definition refers to "physical" access to the water not "public" access.

The City's interpretation of the definition of shoreline recreation is a reasonable interpretation of the plain meaning of the language, and is not inconsistent with the purposes set forth in the Seattle SMP which include encouraging water dependent uses and access to the water. *See* SMC 23.60.002(B). The City's interpretation is also not inconsistent with the stated purpose of the UM Environment which is to preserve areas for water-dependent and water-

related uses while still providing some views of the water from adjacent streets and upland residential streets. SMC 23.60.220.9.a.

Moreover, the City's interpretation gives meaning to all of language in SMC 23.60.936"S.", whereas the Log Foundation's interpretation would render the second sentence in SMC 23.60.936-"S." as superfluous. Under the Log Foundation's proposed interpretation, each component in the list must be analyzed to determine if it meets the general criteria set forth in the first sentence, which removes the purpose for having a specific list and renders no meaning to the phrase, "[t]he following . . . uses are included." Such an interpretation violates the principle that a provision "must not be construed in a manner that renders any portion thereof meaningless or superfluous." *See Svendsen v. Stock*, 143 Wn.2d 546, 555, 23 P.3d 455 (2001).

Finally, if the code provision were considered ambiguous, the City's interpretation of SMC 23.60.936-"S." would deserve deference as the City is charged with interpreting and applying its SMP. *See Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 612, 90 P.3d 659 (2004). The City's interpretation that the Project is a shoreline recreational use even if the boat launching ramp is not open to the general public, is not unreasonable considering: (1) the use of the ramp by the Ducks is a water dependent use, (2) the use will provide physical access to the water, (3) the Ducks provide tours of Lake Union to the public, and (4) the project includes the planting of natural vegetation, including Evergreen trees and low shrubs. In light of the SMP definition of shoreline recreation and the purposes of the SMP and UM Environment, the City's interpretation that the Project is an allowed use is reasonable.

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Order on Motions for Partial Summary Judgment

Accordingly, the City and Lake Union Investments' motion for summary judgment on Issue 3 is GRANTED and the Log Foundation's motion for summary judgment on Issue 3 is DENIED.

# <u>Issue 4: Board Jurisdiction over Consistency with Noise Ordinance</u>

The Respondents have moved to dismiss Issue 4 on the ground that it is beyond the Board's jurisdiction. In Issue 4, Petitioners raised the question whether the SSDP is inconsistent with the goals and policies of Chapter 25.08 of the Seattle Municipal Code. The Respondents argue that the Board does not have jurisdiction over Chapter 25.08 because the provisions in Chapter 25.08 are not a part of the City's SMP.

The Board has a long history of cases addressing the Board's jurisdiction to review a shoreline substantial development permit for compliance with local government's land use codes and comprehensive plans. *See Laccinole v. City of Bellevue*, SHB 03-025, (Order Granting Summary Judgment and Order of Remand, 2004) (Review of Board decisions on this issue, pp. 21 through 29). The Board has jurisdiction only where the land use code or comprehensive plan has been incorporated into the SMP and where Ecology has reviewed and approved the provisions of the land use code or plan in its review of the SMP as required by RCW 90.58.090(1). *See Faben Point Neighbors v. City of Mercer Island*, SHB No. 98-63 (Order Granting Summary Judgment, 1999). The Board concludes that neither of these criteria is met concerning Chapter 25.08 of the Seattle Municipal Code.

The Log Foundation argues that the permit must comply with the City's Noise Ordinance to ensure compliance with SEPA, and thus the Board has jurisdiction to determine whether the

1 SSDP is consistent with Chapter 25.08 through the Board's SEPA authority. 2 Although the Board does not have authority to enforce the City's Noise Ordinance, the 3 Board does have authority to review compliance with SEPA, and noise impact issues have been raised in Issue 6. The question whether the Project's potential impacts concerning noise were 4 5 adequately addressed in the SEPA determination is included in Issue 6. Accordingly, Issue 6 provides Petitioners an opportunity to raise questions concerning whether potential noise impacts 6 from the project have been adequately identified and mitigated. 7 8 Issue 4 is beyond the scope of the Board's jurisdiction and is DISMISSED. Questions 9 about potential noise impacts will be addressed through Issue 6. **ORDER** 10 The Respondents' joint motion for partial summary judgment is **GRANTED** as to Issue 3 11 and the Petitioners' joint motion for partial summary judgment is DENIED as to Issue 3. The 12 13 Respondents' request for dismissal of Issue 4 is **GRANTED**, and Issue 4 is, therefore, DISMISSED. 14 SO ORDERED this 19th day of May, 2015. 15 16 SHORELINES HEARINGS BOARD 17 THOMAS C. MORRILL, Presiding 18 19 DAVE SOMERS, Member 20 21 JENNIFER GREGERSON, Member

Order on Motions for Partial Summary Judgment and Motion for Dismissal SHB No. 15-003c